DISCHARGE OF CONTRACT BY FRUSTRATION
1. THE ROMAN LAW

> "I therefore make no apology for going to the Roman Law, not as an authority (for such it is not), but as instructive as to how these matters may be dealt with and as suggestive . . . as to the true answer to the difficulties of the present case."

So said Lord Dunedin in the course of his judgment in Sinclair v Brougham [1]. The same purpose is in mind here.

So much reference has been made in the decisions (even in those of the highest authority) to the principles of Roman Law dealing with impossibility and frustration that it should be both interesting and instructive to compare the modes in which English and Roman Law would deal with these problems.

Sir James Stephen in his "History of the Criminal Law of England [2] wrote " I do not think that the Roman criminal law as stated in the authorities—contains anything which can justify the loose popular notion that Roman Law is peculiarly complete and scientific." This statement is just as true of the Private Law and an attempt will be made here to show that a strict application of the Roman principles to impossibility or frustration of contract would have been no more equitable than the results achieved by English Law.

In Roman Law contracts were divided under several heads, each characterized by its own "causa" or reason for enforcement. This essay is concerned chiefly with the stipulatio, the consensual contracts (e.g. partnership, sale, work and hire) and the quasi-contract—the condictio indebti and its procedural associates. The stipulatio (which was obsolete by the time of Justinian) was a unilateral contract formed by question and answer. An example is given by Blackburn, J in Taylor v Caldwell [3] in the following words from the Digest [4]: "Si sticnus certo die dari promissus, aute diem moriatur, non tenetur promissor."

The consensual contracts were bilateral and were made as soon as agreement was reached between the parties. They were four in number: Emptio venditio (sale), locatio conductio rei (hire), locatio conductio operis (work) and societas (partnership). The "condictio indebiti" was a quasi ex contractual remedy for money had and received.

The Digest of Justinian recites two main types of impossibility (or "casus" as it was called), initial and supervening impossibility which the authorities subdivided into legal and

(1)—83 L. J. Ch. 465 at p. 483.
(2)—Vol. 1 p. 50 (1883).
(3)—32 L. J. Q. B. at p. 166.
(4)—Digest 45. 1. 33.

physical. An example of initial impossibility would be a contract to sell something which, unknown to the parties, had ceased to exist. This was treated as a case of impossibility and not mistake as in English Law but the result was the same for the contract was void "ab initio." This rule was of universal application. The cases of supervening impossibility quoted in the Digest relate chiefly to the destruction of specific things (certa corpora). Initial impossibility nullified the contract but supervening impossibility avoided it only from the time of the impossibility.

The incidence of risk (or periculum) in Roman Law depended on the type of contract which was called into play. The example quoted by Blackburn, J. in Taylor v Caldwell [5] is a stipulatio and not a contract of sale (emptio venditio). There is no doubt that the promisor was not bound to give the slave if the slave died before the date of delivery. If the promisor could not give, the promisee (or stipulator) was not bound to perform and the contract was at an end. On the other hand if the slave had merely deteriorated or enhanced in value the promisee must pay the stipulated price and receive the detriment or benefit.

The stipulatio is foreign to English Law and since the facts of Taylor v Caldwell do not amount to a sale, the above example is of little help in determining the solution that Roman Law would have given.

Blackburn, J describes the transaction as one of license. It was not even a hiring. In Roman Law such a contract would have been one of hire (or locatio conductio rei). Here the maxim "res perit domino" did apply and the hirer's liability [6] would be extinguished on the destruction of the "res" and the owner would not have been bound to furnish another hall. Thus Roman Law avoided the difficulty encountered by English Law in applying frustration to leases. Whether the "res" was land or a moveable the lessee (or conductor) had a "ius in personam" merely. There was no estate.

The contract to do work was the "locatio conductio operis faciendi." One party agreed, as a contractor, to make or do something, such as build a bridge or house. He was the one on whom the risk fell. Death rarely operated to extinguish this contract unless it depended particularly on some special quality of the contractor.

Appleby v Myers [7] illustrates the difficulties encountered when attempting to apply Roman Law. In this case the plain-

[5] N [3] Supra page [1]
[6]—Buckland's Roman Private Law 2nd Ed at p 501.
[7] 36 L J C P 331.

tiff contracted with the defendant to erect and to maintain for two years certain machinery upon the premises of the latter for a specific sum. When the machinery was only partly erected a fire broke out in the defendant's buildings, without default of either party, and destroyed the building and machinery. The court held that the plaintiffs were not entitled to recover for any portion of the work done since the whole had not been completed. The solution of this problem would depend partly upon whether the employer or the contractor supplied the materials. (i) If the contractor supplied them then the transaction was a sale of the materials and a contract of hire for the services of construction and maintenance; (ii) if the machinery were to become affixed to the immoveable, the whole transaction was a hire (presumably because of the maxim "quod inaedificatur solo credit") without regard to the party who supplied the materials; (iii) if the employer supplied, the transaction was likewise hire. The liabilities of the parties would be as follows: (i) the risk of the material supplied would be on the employer and would be limited to the amount used in the construction up to the time of the fire. This he must pay for regardless of the destruction. As regards the contract of hire, the employer would only be bound to pay the contractor either if he had approved the work done or ought to have done so or if his approval was unnecessary. Otherwise the risk was on the contractor. Alternative (ii) would give the contractor a claim for his materials and services if the progress of the work had been approved or should have been approved by the employer or in the case where no approval was required by the contract. In case (iii) he could recover for his services only as in (ii) above. Thus as far as concerned the contractor's services the result might be the same as in English Law but as regards his materials the same result could only happen in case (ii).

The above were cases of total destruction of the subject matter of the contract and are the type of case contemplated by the Digest. What would be the solution of Roman Law to the case of Krell v Henry [8]. The apartment was still available on the day required and the owner had not undertaken to put on the coronation procession. It is submitted that in such a case the risk must be on the hirer for the Digest is firm that he must accept delivery and is excused only for "casus." In spite of the apparent rigidity of Roman Law, the Commentators and Neo-Civilians have been ingenious to strain its flexibility almost to the breaking point. But the real genius of Roman Law lay not so much in its flexibility as in its certainty. The parties would know at the time of the contract on whom the risk would fall in a particular transaction. It was always open

(8)—(72 L.J.K.B. 794).

to the parties to adjust or apportion the risk by agreement and this could be done with greater facility in Roman Law than in English Law simply because one knew where the risk would fall.

There is one extension of the principle of impossibility beyond the cases mentioned. The doctrine applied with the same incidence when the subject matter was seized by the State. Death of one of the parties put an end to the contract only if it were personal to the deceased party.

Now a few words about the quasi contractual remedies. The "condictio indebiti" lay where money or anything had been given in "error." It was very likely available in cases of initial impossibility but it was most certainly not available for supervening impossibility in consensual contracts. Nor for that matter were "condictio causa data causa non secuta" and "condictio sine causa" which were mentioned by Lord Birkenhead in Cantiere Shipbuilding Co v Clyde Shipbuilding Co [9]. In this case (which was decided on Scots Law) the respondents agreed to construct marine engines for the appellants, to be delivered in twelve months. Part of the price was to be paid on signing the contract. War broke out before the construction had begun after the respondents had done considerable preparatory work. It was held by the Privy Council that the first instalment was returnable subject to a set-off by the respondents in respect of the work they had done. This case is loudly quoted as a testimony to the triumph of Roman Jurisprudence and is contrasted favourably with Chandler v Webster [10] and the Fibrosa Case. [11] The solution of the Roman Law would have been the same as that suggested for Appleby v Myers [12] in the first part of (i) above. Thus the results of Scots and Roman Law might reasonably differ as regards the right of set-off. But the right of the contractor to claim for the materials used arose not by way of a "condictio" but out of the contract of sale itself. Chandler v Webster would have been decided as in English Law because the premises were still available and the suggested solution for the Cantiere case (1) would be applicable to the Fibrosa case.

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2. ENGLISH LAW

(a) Historical Development

The modern simple contract in English Law has existed as such only from the time of Lord Mansfield in the latter half of the eighteenth century and the rules relating to the sanctity of

(9)—93 L.J.P.C. 86.
(10)—73 L.J.K.B. 401.
(11)—111 L.J.K.B. 433.
(12)—N (3) Supra page 2.

contract are the result partly of the old form of covenant and the early forms of action. However critically they may be regarded the courts have always shown a reluctance to interfere with the express terms of the parties; they have held strictly that the parties must be regarded as having contemplated the whole agreement and that the only function of the court is to enforce that agreement if need be.

This is the general position and one into which inroads must necessarily be made. Terms which were implied by custom provided they were not inconsistent with the express stipulation of the parties were deemed to be part of the contract. Then the court set itself within limits to determine the meaning of the contract. In other words while holding that the words or conduct of the parties must always prevail the courts have acted on the maxim "ut res valeat quam pereat" in order to give effect to the contract.

This, however, is very different from implying into a contract a term which will dissolve it. Nevertheless in the wider application of giving effect to the intention of the parties the courts have realized that in certain circumstances the parties would have mutually discharged themselves.

Thus it is the general rule of English Law that pure hardship, or greater hardship than was expected, is no ground for a party to treat his obligation as at an end. There is no doubt that this is the underlying principle of Paradine v Jane [13].

> "When the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract."

This was a case on the action of debt, and the court held it was no answer that the lands on lease in respect of which the money was due had been overrun by the King's enemies. This case has often been quoted as authority for the rule that impossibility of performance by a party is no defence to an action of debt or breach of contract brought against him.

There was, however, one important exception to this general principle in the Common Law. Even before the time of Paradine v Jane [13] the executors of a deceased person were not liable when the performance in a contract was personal to the latter. This principle was cited in Hyde v The Dean and Canons of Windsor [14] and has been repeatedly approved by authority:

(13)—1647 Aleyn 26
(14)—(1597) 78 E.R. 710, 798.
(15)—32 L.J.Q.B. 164.

Taylor v Caldwell [15] made the first serious exception to the rule of Paradine v Jane. Here the parties contracted that a series of concerts should be given on specific dates at the defendants music-hall. After the contract was made but before the date of performance the music-hall was totally destroyed by fire. The plaintiff sued for breach of contract and the defendant pleaded discharge by impossibility of performance. Blackburn, J held that the contract had been terminated by the destruction of the music-hall. In the course of his celebrated judgment he said:

> "The principle seems to us to be that in contracts in which performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility arising from the perishing of the person or thing shall excuse the performance."

This is a great step forward. The disappearance of the subject-matter may, in certain circumstances, excuse the parties from their obligations. Mr. Justice Blackburn was careful to point out that no term could be implied where there was a "positive contract to perform." In that case the parties would be held to their bargain, but a contract in terms positive might be construed as being determinable on some implied term not inconsistent with its express or other implied terms.

Although the parties in Taylor v Caldwell [16] had not expressly mentioned that the destruction of the music-hall would end the agreement, they had apparently gone into detail as to arrangements for the preparation of the music-hall in such a way as to show that the existence of the music-hall in the Surrey Gardens in a state fit for a concert was essential for the fulfillment of the contract [17].

The next development emerged with the famous "Coronation Cases" in 1903. Whatever their differences none of them were impossible or incapable of performance. The subject matter was still in existence and therefore there could be no impossibility in the sense of Taylor v Caldwell. In the latter, Blackburn, J. spoke of the "continued existence of the foundation of the contract." One is required to seek the foundation of the contract, be it some project, material object or person. In Krell v Henry [18] the defendant was to have "the entire use of certain rooms during the days of the 26th and 27th of June." The coronation processions were to pass these premises on the dates named and although it had not been expressly mentioned that the rooms were required for that purpose the court took the view that, having regard to all the circumstances, the parties had contemplated the processions as the foundation of their contract.

(15)—See (3) Supra.
(16)—See (3).
(17)—at p. 166 of the Report.
(18)7p L.J.K.B. 794.

Herne Bay Co v Hutton [19] illustrates the limits of the rule in the previous case. The defendant agreed to charter the steamship of the plaintiff Company for the 28th and 29th of June "for the purpose of the Naval Review, a day's cruise around the fleet and for other similar purposes." Because of the King's illness the review, like the coronation, was cancelled. Romer, L.J., said of this case:—

> "I need scarcely point out that it cannot be said that by reason of the failure of the Review there was a total failure of consideration not anything like a total destruction of the subject matter of the contract." [20]

The expression "total failure of consideration" is introduced. The choice of these words is an unhappy one because frustration may operate where there has been only a partial failure of consideration, as in Krell v Henry [21]. However there was not that loss of the "foundation" of the contract which was held to occur in the latter case.

Such is the difficulty when the frustration of an adventure and not the total destruction of the subject matter is involved. What must happen when there is a partial destruction or a temporary but undetermined incapacity? Lord Sumner in Bank line Ltd v Capel [22] approved the following rule. He said that:

> "The main thing to be considered is the probable length of the total deprivation or use of the chartered ship compared with the unexpired duration of the chartered party—the probabilities as to the length of the deprivation and not the certainty arrived at after the event, are also material."

Reference to a charter party does not restrict this rule. It has been repeatedly affirmed in other types of cases. The test in determining frustration is the probable length of total deprivation and secondly the court must view the matter as the parties would have done when the event happened. A third element is required in such cases.

Three years earlier Tamplin S.S. Co v Anglo-Mexican Petroleum Co [23] was decided in the House of Lords. The defendants took a time charter for five years starting in 1912. In 1914 the Government requisitioned the ship and the House of Lords found, not unanimously, that the interruption was not such as would excuse the parties from further performance. Any interruption is bound to cause some damage to the parties. In the course of Lord Loreburn's speech (1) he posed the following question:

(19)—72 L.J.K.B. 879.
(20)—at p. 882.
(21)—72 L.J.K.B. 794.
(22)—88 L.J.K.B. 211 at p. 218.
(23)—85 L.J.K.B. 1389.

> "Were the altered circumstances such that, had they thought of them, they would have taken their chance of them, or such that as sensible men they would have said, 'If that happens, of course it is all over between us'? What, in fact, was the true meaning of the contract?

This is the third element. One must ascertain from the terms of the contract that **both** parties would have decided not to enter into their contract if the subsequent events (and which they did not contemplate at the time) had been brought to their notice. The foregoing must be read together with the two quoted above from Lord Sumner. In the Bank Line Case [24] the charter was only for twelve months and was made in February, 1915 after the start of the war. We may well ask whether, here, the parties had not contemplated an interruption, such as the requisition by the Government and had in consequence taken the risk and stipulated for a short charter. However, the House of Lords held that the contract had been frustrated. It is not easy to reconcile these two cases. Cheshire [25] explains the apparent anomoly by arguing that there was really no adventure in the Tamplin Case to be frustrated. But on the other hand if the parties in the Bank Line Case had had an interruption in contemplation, then the doctrine of frustration should not have been applied.

(b) Leases

The most interesting problem and the most speculative one is whether the doctrine of frustration applies to a lease. The recent case of Cricklewood Pty v Leighton Trust [26] shows the division of legal opinion on this subject. In this case A had taken a lease of lots of land for 99 years and had undertaken to build shops thereon. After the declaration of War in 1939 the Government imposed severe restrictions on building which amounted to a prohibition. Nor were materials and labour available for the building of shops which was the undertaking in this case. The only question to be decided was whether, on the facts, frustration could be deemed to have occurred (assuming that the doctrine did apply to a lease). The House of Lords unanimously held that there was no frustration but it was evenly divided on the preliminary "obiter" question of applying the doctrine of frustration to a lease, Lord Porter declined to commit himself.

English Law has always distinguished contract and conveyance. It is a corollary of the traditional reluctance of the courts to disturb completed transactions. But on the other hand it seems unjust that a hard and fast line should be drawn and that the vesting of a determinable estate in land should bar

(24)—85 L.J.K.B. 1389 at p. 1394.
(25)—Cheshire and Fifoot, Law of Contracts.
(26)—(1945) 1 All E.R. 252.

the relief open to the parties of a mere contract. Viscount Simon, L.C. in the Cricklewood Case [27] considered the whole problem as "res integra." He felt that he was not bound by authority and distinguished Matthey v Curling [28] as a case where, on the construction of the document, the relevant covenants still bound the lessee. Mr. Justice Blackburn in Taylor v Caldwell [29] stated that it was immaterial that the particular transaction was not a "letting." In Krell v Henry [30] Their Lordships spoke of a "letting" of the premises, although, as in Taylor v Caldwell, the transaction would not operate as a lease because of the limited hours of user.

Paradine v Jane [31] was a claim for a debt (a matter which was emphasized by Lord Simon, L.C. in the Cricklewood Case [32]) and the judgment does not mention tenure and may be taken to state the general rule to which the operation of frustration is the exception. Lord Atkinson in Matthey v Curling [33] approves the statement of Law in Paradine v Jane and Lord Buckmaster in the same case cites Paradine v Jane as an authority that even unlawful entry by a third party will not relieve the lessee of liability under the covenant.

The difficulty is typified by the Cricklewood Case [34]. The mere fact that a particular object cannot be performed for a limited time cannot be considered to frustrate any adventure. But as Atkin, L.J. observed in Matthey v Curling [35].

> ". . . it does not appear to me conclusive against the application to a lease of the doctrine of frustration that the lease in addition to containing contractual terms grants a term of years. Seeing that the instrument, as a rule, expressly provides for the lease being determined at the option of the lessor on the happening of certain specified events. I see no absurdity in implying a term that it shall be determined absolutely on the happening of other events—namely, those which in an ordinary contract work a frustration."

In Bailey v De Crespigny [36] Hannen, J. says:

> "But where an event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular event which afterwards happens."

(27)—(1945) 1 All E.R. 252 at p. 255.
(28)—91 L.J.K.B. 593.
(29)—32 L.J.Q.B. 164 at p. 165.
(30)—72 L.J.K.B. 794.
(31)—1647 Aleyn 26.
(32)—See (1) Supra.
(33)—91 L.J.K.B. 593 at p. 616 and p. 613.
(34)—(1945) 1 All E.R. 252.
(35)—91 L.J.K.B. 593 at p. 603.
(36)—38 L.J.Q.B. 98 at p. 102.

In this case land had been compulsorily acquired by a Railway Company which built on the land so acquired thus contravening an express covenant in a lease in favour of the lessee. In an action on the covenant by the lessee against the lessor it was held that the doctrine of frustration applied to relieve the latter.

In view of the fact that leases usually make provision for insurance and have covenants to repair, it seems difficult to imagine a case where frustration could apply. It is commonplace in frustration that the express terms of the parties must govern and that a positive promise must be fulfilled no matter how onerous. Therefore the cases where the doctrine of frustration might apply in modern leases must be rare indeed.

Were frustration to be allowed to operate, gross injustice might occur, as for example, improvements would cede to the landlord and any premium which had been paid would be forfeited to the lessor since the rights of the parties accruing before frustration would not be disturbed.

In the Cricklewood Case, Lord Russell of Killowen said a lease as a venture could never be frustrated. He was of opinion that the difficulty or impossibility of performing some covenant could not divest the estate. But surely when the parties can say that the estate shall cease on the occurrence of a certain event it cannot be illogical for the court to imply a term which will determine the estate. If a case did arise where the adventure collapsed "owing to the occurrence of an intervening event or change of circumstances so fundamental as to be regarded by the law both as striking at the root of the agreement and as entirely beyond what was contemplated by the parties when they entered into the agreement" then surely there is a case for frustration. The mere rarity of the possible application of the doctrine is confused with the belief that it cannot apply. It is contended that there is ample scope in a proper case where the doctrine may apply and the essence is not so much the distinction between the impossibility of performing a covenant and the divesting of the estate; it is the application of a rule such as that stated by Atkin, L.J. in Matthey v Curling [37] quoted above.

Lord Buckmaster in Matthey v Curling [38] observed "There is no question here of performance having become impossible—although enjoyment of the premises has been interfered with by legal powers." It is true enough that neither the covenant to pay rent nor the covenant to repair had become impossible, but it is just as certain that the foundation of the transaction, namely quiet enjoyment and occupation had been

(37)—See N (9) page 9.
(38)—91 L.J.K.B. 593 at p. 614.

completely disturbed. Parties do not enter into a lease merely to acquire a legal estate but in order that they may enjoy it. A man enters into a contract not merely to acquire legal rights but to acquire the undertaking of the transaction. If he cannot have that undertaking fulfilled in an ordinary contract, frustration may operate (although independently of the will of the parties). How then is it logical to deny a similar discharge where the parties have transferred a determinable legal estate and where the object for which such transfer was made has become "defunctus"? Nor is it altogether an answer that the Government will indemnify for the interruption. Frustration has been awarded in cases of charter-parties notwithstanding that compensation might be payable by the requisitioning authority. Examples could be multiplied. "The Doctrine of Frustration" observes Lord Wright in the Cricklewood Case [39] "is modern and flexible and is not subject to being constricted to an arbitrary formula".

(c) Burden of Proof of Default

It is axiomatic that a party cannot benefit from his own wrongful act or default. So then default will bar the seeking relief on the ground of frustration. Lord Simon, L.C. in Constantine Line v Imp. Smelting Corpn [40] approves the above rule and sets out to decide on whom lies the burden of proving such default. If default will negative the plea of frustration, is it necessary that the party setting up frustration should show that he had not been guilty of default or neglect? The House of Lords in the above case answered unanimously in the negative. The obvious hardships of any other rule are pointed out in the speeches of Their Lordships. The rule is that once frustration has been established a case is made out for the prima facie discharge of the contract. The party alleging the default must prove it.

But what default will deprive frustration of its effect? What happens in cases of personal performance? Lord Simon [41] quotes the case of a prima donna who has caught a cold because she was careless in not changing her wet clothes after being in the rain. His Lordship enquires whether her plea of frustration of an executory contract to sing would fail on this ground. It is not intended to answer this question but it is worth while to point out that the self-induced frustration is not coextensive with "default," and to note that default may include negligence as well as wilful default. The precise limits of these terms is yet to be judicially defined.

(39)—(1945) 1 All E.R. 252 at p. 263.
(40)—(1941) 2 All E.R. 165.
(41)—(1941) 2 All E.R. 165 at p. 173.

(d) The Effects of Frustration

The rule in Chandler v Webster [42] that, in cases of frustration "the loss lies where it falls" has been a blot on English jurisprudence since it was laid down in 1904. But even in spite of the Fibrosa Case [43] the rule may be valid even today. Their Lordships, in the latter case, held that if the rule was intended to refer to a payment made out and out then the rule was correct. Where the consideration was divisible and payment had been made or been appropriated in satisfaction of some executed part of the agreement then that money must be irrecoverable. The rule in the Fibrosa Case [44], under which money paid is recoverable, will apply only when the consideration is entire and there has been a total failure of consideration.

Lord Simon argued that this was an action "quasi ex contractu" for the recovery of money paid for a consideration that has totally failed. The law implies a promise to repay notwithstanding the firm rule that frustration does not disturb the rights of the parties acquired before frustration. It would appear that one party would have a right to sue for money due while the other would have an action "ex contractu" to recover it back. This seems to be the result of this case. Their Lordships take refuge in the venerable maxim "Nemo debit locupletari aliena jactura," and Lord MacMillan attempts to resolve the problem by stating: [45] "on the other hand the law may endeavour to effect an equitable adjustment between the parties". It can hardly be said that the Fibrosa solution was an equitable adjustment between the parties. The respondents who had been put to considerable expense were not permitted to retain a "quantum meruit" for the fruitless work they had done. Later on, His Lordship explains [46] the harshness of the rule and says that English Law takes the course "that the law implies for the parties what it assumes they would have agreed upon—when they entered the contract." One must accept this decision as an example of the court in its role of the reasonable man, adopting a course which it is inconceivable that any reasonable business man would adopt.

The maxim "the loss lies where it falls" cannot apply where money is paid for a consideration that has failed. It applies, however, in other respects.

(42)—73 L.J.K.B. 401.
(43)—111 J.J.K.B. 433.
(44)—See (2) above.
(45)—111 L.J.K.B. 433 at p. 446.
(46)—See (4) Supra.

The Fibrosa Case must be taken to have laid down the law applicable in the Common Law Provinces of Canada. England now has the Law Reform (Frustrated Contracts) Act 1943 to remedy the defect. It is possible under this Act to achieve the results that were achieved for the Law of Scotland twenty years ago by the Cantiere Case [47]

A term was implied by custom in voyage charters making freight paid in advance irrecoverable. The Act has made no provision against this.

CONCLUSION

The difficulties of English Law have been twofold: to determine (a) when the events could be said to constitute frustration and (b) how the risk involved should be distributed.

In case (b) the course of the Roman Law has much to recommend it. The parties knew exactly where the risk would fall in any particular transaction and it was, therefore, easy for them to apportion it by agreement. It was no hardship to the buyer to be responsible for the risk after the contract because he could contract against it. The Sale of Goods Act 1893 makes a simple provision for the incidence of risk in agreements to sell specific goods. The English formula (which still remains and more particularly in Canada) that the "loss lies where it falls" is unscientific in that one can never foretell just where it will fall. In Chandler v Webster [48] for instance the loss might easily have been the other way. How far the incidence of this rule has been removed by the Law Reform (Frustrated Contracts) Act 1943 remains to be seen. One must hope that its salutary provisions will not be too strictly construed. At any rate it represents a break from English Tradition and recognizes the principles of Roman Jurisprudence insofar as they have been altered and accepted by Scots Law in the Cantiere Case [49].

In case (a) the problem is to find a definition of the principle which will apply to cases of destruction of the subject matter and frustration of the adventure alike. But before a general rule can be stated it is necessary first to dispose of certain cases which will not come within the frustration rule whatever it may be. Where the parties contemplate the existence of something which, at the time of making the contract is non-existent, the purported contract is void "ab initio" for mistake. There is no contract and no question of frustration arises. But where the event occurs after the contract is made,

(47)—93 L.J. P.C. 86.
(48)—73 L.J.K.B. 401.
(49)—See (1) above.

frustration does not "ipso facto" arise. A consideration of the above cases shows that the event must be of a definite character and the contract is good until this is successfully proved. The general rule relating to contracts appears still to be governed by Paradine v Jane [50].

The event which has brought about impossibility may be the result of the act of one of the parties and if this is so, the courts will not allow him nor, apparently, the other party to take advantage of frustration as a ground of discharge. This is called self-induced frustration and was defined and approved by Lord Sumner in Bank Line Ltd v Capel [51]. Here His Lordship remarked, "I think it is now well settled that the principle of frustration of an adventure assumes that the frustration arises without blame or fault on either side [52].

In Maritime National Fish Co v Ocean Trawlers [53] a vessel had been chartered but remained subject to the granting of licenses by the Dominion Government. Some licenses were issued but not sufficient to cover all the respondent's vessels and the latter appropriated the licenses to their other ones, thus leaving the one chartered to the appellants without any. The former pleaded frustration but it was held by the Privy Council that, since they had caused the frustrating act, they could not set it up to discharge the contract. The parties may contemplate the happening of the event which caused frustration. The weight of authority excludes this type of agreement from the doctrine. However there are two cases in which this does not appear to have been the case. In the Tatem v Gamboa [54] a boat was chartered during the Spanish Civil War to work on behalf of the Republican Government, a matter which would naturally involve the risk of confiscation by the Nationalist forces. This event did occur but the court held that the contract had been frustrated. Goddard J. found as a matter of construction that such an event was not in the contemplation of the parties at the time of the contract. The same decision was reached in the Bank Line Case [55] and the same objection may be taken.

Total failure of consideration has been mentioned (Herne Bay S.S. Co) [56]. But there are too many cases where this had not been so. Total failure of consideration is not enough. Taylor v Caldwell and Krell v Henry suggest that one condition must be performance within the terms of the contract. This may or may not involve total failure of consideration.

(50)—1647 Aleyn 26.
(51)—88 L.J.K.B. 211 at p. 217.
(52)—See (2) Supra.
(53)—104 L.J. P.C. 88.
(54)—(1938) 3 All E.R. 135.
(55)—See (2) Supra.
56—72 L.J.K.B. 879.

If a person enters into an absolute positive contract it is no defence to say that it has become burdensome or even impossible. He is bound to perform. However terms, in themselves positive, may be so framed that they can be held to assume the continuance of some person, material-object or state of affairs, and it is a question of construction in each case where such an implication can validly be made. Lord Wright in the Constantine Case [57] in referring to an opinion of Lord Sumner said:

> "It is true that a contract absolute in terms may be absolute also in effect. The contractor if he cannot perform, must pay damages . . . . However a contract absolute in terms is not necessarily absolute in effect."

The Learned Law Lord was referring to Lord Sumner's dictum in Hirji Mulji v Cheong Yue Steamship Co [58] "it is really a device by which the rules as to absolute contracts are reconciled with a special exception which justice demands." Lord Sumner was referring indirectly to a question of construction, and distinguishing the doctrine of frustration from rescission which operates at the will of the party aggrieved. One must look at the contract at the time the parties entered into it to determine whether the existence or continuance of any special circumstances was to be vital to the contract.

When the event brings about temporary deprivation the test must be that laid down by Lord Sumner in the Bank Line Case [59] as follows:

> "The main thing to be considered is the probable length of the total deprivation of the use of the charatered ship compared with the unexpired duration of the charter party."

The doctrine of frustration will operate as a condition, implied by law into the contract provided, such condition was:

(i) not contemplated by the parties at the making of the contract and they made no provision for it;

(ii) the event was of such a nature that had the parties thought of it they would never have entered the contract;

(iii) the event destroys the foundation of the contract as **both** parties understood it when they entered into it;

(iv) the event was not brought about by the default of either party.

(57)—(1941) 2 All E.R. 165 at p. 185.
(58)—95 L.J.P.C. 121 at p. 129.
(59)—88 L.J.K.B. 211.

All of this is to some extent a far cry from the original rules of Roman Law which have been extended and distorted to give English Law its modern doctrine of frustration. Although Roman Law did not arrive at a generalization of the principles as they are known today yet a study of that heritage has brought great and fruitful results to both English and other systems of Jurisprudence.

THE THIRTIETH MEETING OF THE CANADIAN BAR ASSOCIATION

Although the Thirtieth meeting of the Canadian Bar Association began on Monday, August 30, with registration taking place all day, the meetings were confined to the Executive Committee of the Canadian Bar Association, the Conference of the Governing Bodies of the Legal Profession in Canada and the Council of the Canadian Bar Association. Not until Tuesday, August 31, was the official opening held, with the President of the Association, John T. Hacker, K.C., M.P., presiding. At this opening session Prime Minister Maurice Duplessis of Quebec spoke. His speech was both interesting and novel especially in the manner in which he presented Quebec's case for judgment in connection with the much-talked about and famous Quebec Padlock Law.

The Presidential Address was given by John T. Hackett and the annual reports of the various committees were then given. At noon there was a luncheon given by the Bar of Montreal in the Normandie Room at the Mount Royal Hotel. The Hon. A. T. Vanderbuilt, Chief Justice of the State of New Jersey, gave a most interesting address.

The afternoon was taken up by meetings of various sections of the Bar Association; a somewhat unique situation occurred in that all sections met at the same time, a fact which was to receive some criticism by the close of the conference.

Dinner was given by the Government of the Province of Quebec in the Windsor at which Maitre Maurice Ribet, Batonnier de l'Ordre des Advocats a la Cour de Paris, was the speaker.

Wednesday started with sectional meetings till noon when a luncheon was given by the General Council of the Bar of Quebec. The address was given by the Hon. John A. Costello, Prime Minister of Eire. His address centered around the independence of Eire which he termed Ireland and he stressed the lead